MICHAEL RODAK, JR.,

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-586

ELMER O. CADY, WARDEN,
Petitioner,

v.

CHESTER J. DOMBROWSKI,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY BRIEF

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March 15, 1973

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ADDENDUM TO THE STATEMENT OF THE CASE

Since the filing of the petitioner's brief in this case there was filed with the Clerk of the Court on February 9, 1973, a supplement to the record on appeal consisting of the following documents:

1. Transcript of proceedings: Conference in chambers, arraignment, motions before Hon. Jerold E. Murphy had on 5/20/68 consisting of 37 pages;

2. Transcript of supplemental testimony offered in support of defense motions had before Hon. Jerold E. Murphy on 6/4/68 consisting of 51 pages; (A. 167)

3. Copy of covering letter to Kenneth J. Carrick from Ruth W. LaFave transmitting Exhibits A, B, C, D, and E with receipt for certified mail attached.

Counsel has been advised by the Clerk of the United States District Court for the Eastern District of Wisconsin that the two transcripts above described were located in the office of the Clerk of the Court of Appeals for the Seventh Circuit in Chicago, Illinois, and the covering letter transmitting Exhibits A, B, C, D, and E to the Clerk of the United States Court of Appeals in Chicago, dated July 21, 1971, was apparently found somewhere in the Clerk's office in Milwaukee.

Had counsel been aware that Exhibits A, B, C, D, and E were actually transmitted to the Court of Appeals in Chicago, of course no reference would have been made to the apparent lack of examination of the trial record by the Court of Appeals. The original record filed with this court, as well as the docket entries in the United States District Court for the Eastern District of Wisconsin did not reveal that Exhibits A, B, C, D, and E had been sent to the Court of Appeals over five months after the original record was sent.

To the extent, therefore, that appellant's brief indicates that the Court of Appeals did not have the benefit of the examination of Exhibits A, B, C, D, and E, such statements or inferences are respectfully withdrawn.

I. Petitioner's Arguments Have Been Consistent.

In section I.A of his argument, respondent scores petitioner for taking allegedly inconsistent positions in the courts below. (Respondent's Brief, pp. 18-19.)

The petitioner has been consistent during the habeas corpus proceedings in the District Court, the Court of Appeals, and this court in the position that the conduct of Officer Weiss was not a search within the meaning of the constitutional provision. The fact that the term "search" has been used interchangeably with the term "inspection" does not change the principal question in regard to Officer Weiss's conduct, and that is whether he conducted an unreasonable search within the meaning of the Fourth Amendment to the United States Constitution. The Wisconsin Supreme Court called Weiss's action an "inspection," *State v. Dombrowski* (1969), 44 Wis. 2d 486, 496, 171 N.W. 2d 349, and the District Court described his action as an "examination" and an "inspection," 319 F. Supp. 532.

The fact that the courts, as well as the three different lawyers who have represented the State of Wisconsin at the various stages of this proceeding, may have used different terminology, is merely confirmation of the proposition that there is not unanimity among the courts and the lawyers in dealing with search and seizure questions. One thing is for certain, however, the State of Wisconsin has taken the position from the very beginning that Officer Weiss's conduct was not a search within the constitutional sense because he did not act with a view to or with intent to discover evidence of any crime.

He was acting solely to protect the property of Mr. Dombrowski. For an excellent discussion on inventory-type "searches" see *United States v. Mitchell* (9th Cir. 1972), 458 F. 2d 960. See also *United States v. Pennington* (5th Cir. 1971), 441 F. 2d 249, cert. den. 404 U.S. 854.

II. Dodge Search Warrant Was Not Returned.

Respondent continues to assert, as he did before the Court of Appeals, that the search warrant was executed on the night of its issuance, was returned before Mauer came across the white sock and the floor mat and, therefore, at the time of Mauer's acts the warrant had already been executed and a return prepared. Notice, however, that no claim is made that the return had been filed, just "prepared." Respondent cites 79 C.J.S., *Searches and Seizures* §83, p. 897, as authority for the proposition that when the warrant has been executed it cannot thereafter serve as a basis for unlimited additional searches.

The same C.J.S. citation, however, supports the proposition that a search may be continuous where it is not abandoned or completed and will not be held void because the officers go over the premises a second time. It is clear from the record in this case that the search was not completed at the farm the night the search warrant was issued because, as a practical matter, it would be foolish to search in the dark when the vehicle was being taken to the sheriff's garage where experts from the Crime Laboratory could assist the sheriff the following morning in a complete search of the vehicle for evidence of murder. The judge's order for impounding, the

sheriff's arrangements with the tow truck operator to remove the vehicle to the sheriff's garage, and the filing stamp on the return showing the return was not made until September 14, 1967, the day after the search in the sheriff's garage (A. 33), all support the proposition that the search was continuous and took place while the warrant was still in effect.

III. Exclusionary Rule Should Be Examined.

Respondent contends that since the Court of Appeals did not consider the exclusionary rule and the issue was never briefed in that court, it should not be considered by this court. *Bivens v. Six Unknown Named Agents* (1971), 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed. 2d 619, is cited as authority for the proposition that where the Court of Appeals has not passed upon an issue this court will not consider the question.

In that case, however, the District Court had ruled that the federal agents were immune from liability by virtue of their official position, but since the Court of Appeals had not ruled on that issue, this court did not consider that particular question.

Here, we are dealing with a rule adopted by this court and only this court can modify the rule.

Respondent's notion that the modification of the exclusionary rule under the Fourth Amendment would modify Wisconsin's exclusionary rule, prohibiting the introduction of evidence obtained as a result of illegal search and seizure in violation of Wisconsin's Constitution, is without merit.

The proposition that each state may have more stringent requirements under its constitutional provisions needs no citation. That the Wisconsin courts would modify their interpretation of the federally imposed exclusionary rule if modifications were made by this court would only appear to be appropriate insofar as their interpretation of the federal constitution is concerned.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, a member of the Bar of this Court, do hereby certify that on March 15, 1973, I duly mailed three copies of the Reply Brief for petitioner to each of the attorneys for respondent, addressed as follows:

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